CAPITAL INSURANCE BHD

v.

CHEONG HENG LOONG GOLDSMITHS (KL) SDN BHD

FEDERAL COURT, PUTRAJAYA
STEVE SHIM CJ (SABAH & SARAWAK)
ABDUL HAMID MOHAMAD FCJ
PS GILL FCJ
[CIVIL APPEAL NO: 02-11-2004 (W)]
20 APRIL 2005

CIVIL PROCEDURE: *Execution - Garnishee proceedings - Garnishee proceedings ordered converted into writ action by Judge in chambers - Judge acting on own motion - No application to convert garnishee proceedings - Whether Judge correct in making such order*

CIVIL PROCEDURE: *Parties - Locus standi - Insurance policy between insurer and insured - Third party making claim on such policy - Third party not a beneficiary or nominee to such policy - Third party merely judgment creditor of insured - Whether third party had locus standi to make such claim*

CIVIL PROCEDURE: *Parties - Locus standi - Claim by third party on insurance policy - Third party not a beneficiary or nominee to such policy - Third party merely judgment creditor of insured - Insured uninterested in pursuing claim against insurer - Whether Public Trustee could be appointed to sue on behalf of insured - Whether Public Trustee's approval of third party's statement of claim constituted third party's authority to sue on the policy - Whether third party had locus standi to commence action - Whether third party had locus standi to claim under the policy*

CIVIL PROCEDURE: *Appeal - Parties - Claim by insured against insurer dismissed - Appeal by insured against insurer withdrawn - Whether third party having no locus standi in claim between insured and insurer could lodge and maintain appeal*

CIVIL PROCEDURE: *Appeal - Facts, finding of - Approach of appellate court*

EVIDENCE: *Hearsay - Document - Admissibility v truth of contents - Failure to object, effect of*

EVIDENCE: *Documentary evidence - Admissibility - Whether consideration of document's admissibility synonymous to consideration of the truth of contents of the document*

CIVIL PROCEDURE: *Execution - Garnishment - Claim under insurance policy – Insured not serious in pursuing claim - Evidence of fraudulent claim - Whether there was a debt owed by insurer to insured - Third party having valid claim against insured - Whether third party could garnish debt owed by insurer to insured*

The appellant herein insured one Chan Kim Swee @ Tung Kim Swi ('the insured') under a Jeweller's Block Policy. By the terms of the policy, the appellant agreed to insure and indemnify the insured against, *inter alia*, loss arising from any hold-up or robbery of stock and merchandise of the insured's business, whether his or entrusted to him for the sum of RM600,000. The policy was for a period of one year, *ie*, from 16 October 1984 to 15 October 1985. Between 9 November 1984 to 26 November 1984 the respondent sold gold items to the insured totaling RM555,362.97 in value. The respondent last supplied gold items to the insured on 26 November 1984. On that same day, the insured alleged that he was held-up and robbed *inter alia* of gold items valued at RM700,000. The insured lodged a police report more that 24-hours after the incident. No details were given in the police report of the gold items allegedly taken from him. One week after the alleged robbery, the insured went to see SP1 – the respondent's manager, asked him for time to pay and promised him RM500,000 upon obtaining the insurance money from the appellant. The insured intended to keep RM100,000 for himself. The insured submitted his claim form on 10 December 1984. Adjusters were appointed to investigate the claim. A report – P9 – was produced in which the adjusters, after having interviewed the insured, his business associates and the police, suggested that there was indeed a carefully planned and executed robbery. On 20 August 1985, the respondent obtained judgment in default of appearance against the insured for the sum of RM555,362.97 with interest thereon at the rate of 8% per annum from 13 February 1985 to date of full realisation and costs. The respondent applied for a garnishee order against the appellant but the application was dismissed by the SAR. The respondent appealed to the judge in chambers. The insured however did not appear before the SAR during the garnishee proceedings, did not appeal against the SAR's order, and neither did he appear before the judge in chambers. There was evidence on record to show that numerous attempts to trace the insured were unsuccessful. At the appeal, the judge in chambers – Shankar J (as he then was) – on his

own motion, *inter alia* ordered the garnishee proceedings be converted into a writ action. The matter was ordered to proceed to trial wherein the respondent was to be plaintiff; the insured the co-plaintiff and the appellant the defendant. The Public Trustee was also appointed to represent the interests of the insured. The question to be tried concerned whether there was any debt due or accruing and if so the amount under the policy from the appellant to the insured at the time the garnishee order was served on the appellant. The respondent thus commenced suit and filed a statement of claim. The insured was named as the second plaintiff. Both the respondent and the insured prayed for the payment of the insured sum by the appellant. The statement of claim clearly stated that the firm Messrs SY Lai & Associates was only acting for the respondent. No separate statement of claim was filed by the Public Trustee who nevertheless 'approved' the statement of claim. The suit was heard by Ariffin Jaka J (as he then was). The learned judge dismissed the claim and in doing so held *inter alia* that P9 relied upon by the respondent to prove the robbery was hearsay and thus not admissible. The judge expressed doubts over the robbery and further held that the failure of the insured to give information and evidence as to the property lost or damaged as required by the insurers constituted non-compliance with the condition precedent (condition 6) in the insurance policy. Ariffin Jaka J was also of the view that there was no debt due to the insured from the garnishee-appellant (defendant). The respondent and the Public Trustee on behalf of the insured appealed to the Court of Appeal. The Public Trustee later withdrew the appeal. The appellant appealed to the Federal Court.

Held (allowing the appeal)
Per Abdul Hamid Mohamad FCJ:

[1] The respondent applied to consolidate the two appeals. On the day the application was fixed for hearing, the Public Trustee withdrew the insured's appeal and the appeal was dismissed. As a result, no order for consolidation of the two appeals was made. However, in its judgment the Court of Appeal said 'There are two consolidated appeals before us'. This was clearly wrong. (p 13 b)

[2] Although Shankar J had the jurisdiction to convert the garnishee proceedings into a writ action, he should not have done so. The respondent was merely a judgment creditor. The respondent had no locus to make a claim on the policy. Only the insured had. The insured was not interested. He disappeared and did not appear in any of the proceedings. By directing that the statement of claim be filed and that the insured be named as a co-plaintiff, though not asked for, the learned judge was giving the

respondent a leg to stand on to make a claim on the policy which it had no right to. Further, by directing the Public Trustee to represent the interests of the insured, Shankar J was imposing an unnecessary burden on the Public Trustee to represent the interests of a person who was himself not interested to pursue his claim. (p 13 e-g)

[3] Notwithstanding the fact that the Public Trustee 'approved' the statement of claim filed by Messrs SY Lai & Associates, who clearly stated in the statement of claim that they were only acting on behalf of the respondent, this did not authorize the firm to sue on behalf of the insured on the policy. Further, the Public Trustee having filed the notice of appeal to the Court of Appeal on behalf of the insured, withdrew the appeal and it was dismissed. The respondent's appeal to the Court of Appeal should therefore have been dismissed. The respondent had no locus to make a claim on the policy, being only a judgment creditor. (pp 13 h & 14 a-d)

[4] The finding whether there was a robbery or not was a finding of fact, which normally an appellate court should be slow to interfere with, unless there is a misdirection in law or the finding is so perverse and not supported by evidence. Whereas the trial judge trial (Ariffin Jaka J) considered the whole evidence, or the lack of it, the Court of Appeal decided the issue purely on P9. The trial judge narrated the evidence and gave his reasons why he found that there was no robbery. His reasons could not be faulted. There were indeed suspicious circumstances surrounding the alleged robbery. In his police report the insured did not mention at all the presence of his 'two business associates', 'companions' or 'friends' in his car at the time of the alleged robbery. These companions were however mentioned in P9. The judge should have drawn an adverse inference against the respondent in respect of his 'two business associates', 'companions' or 'friends'. (p 21 a-g)

[5] Two evidential issues had to be determined concerning P9. First, whether P9 was admissible in evidence. Second, whether its contents were admissible to prove the fact that there was a robbery. On the facts, the trial judge was right in admitting the report in evidence against the objection that it was a privileged document. However, having admitted the document, the court had still to decide whether its contents were admissible to prove the fact of the robbery. Failure to object at the time a document is marked does not affect the admissibility of the content. The failure to cross examine as to the truth of a statement which is admissible may amount to an admission of the truth of the statement. However, a statement does not become admissible because it is true, even if it is true. It must first be admissible before its truth may be considered. (pp 22 g, 23 b, g & 24 b-c)

[6] The Court of Appeal *inter alia* held P9 was admissible because the adjuster's had made admissions in P9. However, the Federal Court, having read the whole of the evidence on record, could not find any evidence, that the appellant had made an admission to the respondent that the robbery had happened. There was also no evidence that the adjuster was authorised by the appellant to make an admission of that fact to the respondent and having been so authorised, made the admission. (p 24 g)

[7] P9 by itself did not prove the robbery. It had no evidential value whatsoever. The trial judge had done the right thing in considering the whole of the evidence or the lack of it to find that the robbery had not been proved. P9 did not bind the appellant. On the facts, there was no basis for an appellate court to reverse the finding of fact of the trial judge that the robbery had not been proved. (pp 25 h, 26 a, f-h & 27 c)

[8] The respondent could only garnish the debt if there was a debt due from the appellant to the insured. The insured had merely filed a claim with the appellant alleging that a robbery had happened before disappearing. The trial judge correctly found that the alleged robbery was a fake or had not been proved. The appellant had not admitted liability. There was certainly no debt due from the appellant to the insured that could be garnished. (p 27 d-e)

*[**Bahasa Malaysia** Translation Of Headnotes*

Perayu di sini telah menginsurankan seorang bernama Chan Kim Swee @ Tung Kim Swi ('Chan Kim Swee') di bawah suatu Polisi Kumpulan Peniaga Intan Berlian. Di bawah terma polisi tersebut, perayu telah bersetuju menanggung gantirugi pihak yang diinsurankan di atas, antara lain, kerugian yang berpunca dari sebarang rompakan stok dan barangan perniagaan Chan Kim Swee, sama ada kepunyaannya atau yang telah diamanahkan kepadanya setakat sejumlah RM600,000. Polisi tersebut adalah bagi tempoh setahun iaitu dari 16 Oktober 1984 sehingga 15 Oktober 1985. Antara 9 November 1984 sehingga 26 November 1984 responden telah menjual barangan emas kepada Chan Kim Swee bernilai RM555,362.97. Kali terakhir responden membekalkan barangan emas kepada Chan Kim Swee adalah pada 26 November 1984. Pada hari yang sama, Chan Kim Swee mendakwa ia telah dirompak, antara lain, barangan emas bernilai RM700, 000. Chan Kim Swee telah membuat laporan polis lebih 24 jam selepas kejadian itu. Butir-butir barangan emas yang telah diambil darinya tidak diberikan. Seminggu selepas rompakan yang didakwa itu, Chan Kim Swee telah pergi berjumpa SP1 – pengurus responden, meminta masa untuk membuat bayaran dan menjanjikannya bayaran RM500,000 sebaik sahaja mendapat wang insuran dari perayu. Chan Kim Swee berhasrat menyimpan

baki RM100,000 bagi dirinya sendiri. Chan Kim Swee telah mengisi borang tuntutan pada 10 Disember 1984. Jurunilai telah dilantik menyiasat tuntutan itu. Suatu laporan – P9 – telah dikeluarkan di mana Jurunilai, setelah menemuramah Chan Kim Swee, rakan perniagaannya dan pihak polis, telah mencadangkan memang pernah terjadi suatu rompakan yang telah dirancang dan dilaksanakan dengan teliti. Pada 20 Ogos 1985, responden telah memperolehi penghakiman tanpa kehadiran terhadap Chan Kim Swee bagi jumlah RM555,362.97 dengan faedah keatasnya pada kadar 8% setahun dari 13 Februari 1985 sehingga tarikh penyelesaian dan kos. Responden telah memohon suatu perintah garnishee ke atas perayu tetapi permohonan itu telah ditolak oleh SAR. Responden merayu kepada Hakim dalam kamar. Walaubagaimana pun Chan Kim Swee tidak hadir di hadapan SAR semasa tindakan garnishee itu, tidak merayu ke atas perintah SAR itu malah tidak hadir dihadapan hakim dalam kamar. Tiada sebarang keterangan dalam rekod bagi menunjukkan yang beberapa percubaan bagi mengesan Chan Kim Swee tidak berjaya. Dalam rayuan itu, Hakim dalam kamar – Shankar H (beliau semasa itu) – di atas budicaranya sendiri, antara lain, memerintahkan tindakan garnishee ditukar menjadi suatu tindakan writ. Perkara itu diperintahkan dibicarakan dengan menjadikan responden dan Chan Kim Swee sebagai plaintif dan perayu sebagai defendan. Pemegang Amanah Awam juga dilantik bagi mewakili kepentingan Chan Kim Swee. Persoalan yang perlu dibicarakan adalah sama ada wujudnya sebarang hutang dan nilainya di bawah polisi antara perayu dan Chan Kim Swee pada masa perintah garnishee diserahkan ke atas perayu. Maka responden telah mulakan tindakan dan memfailkan suatu pernyataan tuntutan. Chan Kim Swee dinamakan sebagai plaintif kedua. Kedua-dua pihak responden dan Chan Kim Swee memohon bayaran insuran oleh perayu. Pernyataan tuntutan jelas menyatakan firma Tetuan SY Lai & Associates hanya bertindak bagi pihak responden. Tiada sebarang pernyataan tuntutan berasingan difailkan oleh Pemegang Amanah Awam, malah beliau telah 'memperkenankan' pernyataan tuntutan itu. Tindakan telah didengar oleh Ariffin Jaka H (beliau semasa itu). Hakim yang bijaksana telah menolak tuntutan dan dalam berbuat demikian memutuskan antara lain bahawa P9 yang disandar responden bagi membuktikannya adalah 'hearsay' semata-mata maka ia tidak dapat diterima. Hakim telah mengungkap kesangsiannya ke atas rompakan itu dan memutuskan kegagalan Chan Kim Swee memberi informasi serta keterangan akan harta yang hilang atau rosak sepertimana dikehendaki pihak penginsuran menjadi satu ketidakmenepatian suatu pra-syarat (syarat ke 6) polisi insuran itu. Ariffin Jaka J juga memutuskan bahawa tidak wujud sebarang hutang kepada Chan Kim Swee dari pihak garnishee-perayu (defendan). Responden dan Pemegang Amanah Awam bagi pihak Chan Kim Swee telah merayu kepada Mahkamah Rayuan. Pemegang Amanah Awam kemudian telah menarik balik rayuan itu. Perayu merayu kepada Mahkamah Persekutuan.

Diputuskan (membenarkan rayuan itu)
Oleh Abdul Hamid Mohamad HMP:

[1] Responden telah memohon menggabungkan kedua-dua rayuan itu. Pada hari permohonan itu ditetapkan bagi kedengaran, Pemegang Amanah Awam telah menarik balik rayuan Chan Kim Swee dan rayuan itu telah ditolak. Akibatnya, tiada sebarang perintah penggabungan kedua-dua rayuan tersebut dibuat. Walaubagaimana pun, dalam penghakimannya Mahkamah Rayuan telah menyatakan 'Wujud dua rayuan yang digabungkan dihadapan kami'. Adalah jelas ini tidak betul.

[2] Walaupun Shankar H mempunyai bidangkuasa menukarkan tindakan garnishee kepada suatu tindakan writ, beliau tidak sepatutnya berbuat demikian. Responden sekadar seorang pemiutang penghakiman. Responden tidak mempunyai "locus" bagi membuat tuntutan ke atas polisi itu. Hanya Chan Kim Swee dapat berbuat demikian. Chan Kim Swee tidak berminat. Ia telah hilang dan tidak hadir dalam sebarang tindakan. Mengarahkan supaya pernyataan tuntutan difailkan dan Chan Kim Swee dinamakan salah seorang plaintiff, walaupun tidak diminta berbuat demikian, Hakim yang bijaksana memberikan responden suatu alasan membuat tuntutan ke atas polisi itu walaupun ia tidak mempunyai sebarang hak berbuat demikian. Lebih-lebih lagi, dengan mengarahkan Pemegang Amanah Awam mewakili kepentingan Chan Kim Swee, Shankar H telah meletakkan suatu beban yang tidak perlu ke atas Pemegang Amanah Awam dalam mewakili kepentingan seorang yang sendirinya tidak berminat menghambat tuntutannya.

[3] Walaupun Pemegang Amanah Awam telah 'memperkenankan' pernyataan tuntutan yang difailkan oleh Tetuan SY Lai & Associates, yang jelas telah menyatakan dalam pernyataan tuntutan itu bahawa mereka hanya mewakili responden, ini tidak membenarkan firma itu mendakwa bagi pihak Chan Kim Swee ke atas polisi itu. Lebih-lebih lagi, Pemegang Amanah Awam setelah memfailkan notis rayuan ke Mahkamah Rayuan bagi pihak Chan Kim Swee, telah menarik balik rayuan itu dan ia telah ditolak. Rayuan responden ke Mahkamah Rayuan harus juga ditolak. Responden tidak mempunyai sebarang "locus" membuat tuntutan ke atas polisi, memandangkan ia sekadar seorang pemiutang penghakiman.

[4] Keputusan sama ada pernah terjadi suatu rompakan atau sebaliknya adalah suatu pendapat fakta, dan Mahkamah Rayuan keberatan campur tangan dengannya, kecuali terdapat suatu salah arahan undang-undang atau sesuatu keputusan semakin rumit dan tidak disokong langsung oleh keterangan. Walaupun hakim perbicaraan (Ariffin Jaka H) telah menimbang keseluruhan keterangan, atau ketiadaannya, Mahkamah Rayuan telah memutuskan isu

itu semata-mata berasaskan P9. Hakim perbicaaan telah menyenaraikan keterangan yang ada dan memberi alasannya mengapa beliau memutuskan tidak berlakunya rompakan. Alasannya tidak dapat dipersalahkan. Memang wujud beberapa keadaan yang mencurigakan dalam rompakan yang didakwa itu. Dalam laporan polisnya Chan Kim Swee tidak menyebut langsung kehadiran 'dua rakan kongsi', 'teman' atau 'kawan' dalam keretanya semasa rompakan yang didakwa itu. Rakan kongsi ini ada disebut dalam P9. Hakim harus membuat anggapan melawan responden berkaitan 'dua rakan kongsi', 'teman' atau 'kawan' nya.

[5] Dua isu keterangan perlu dikenalpasti berkaitan P9. Pertama, sama ada P9 dapat diterima sebagai keterangan. Kedua, sama ada kandungannya dapat diterima bagi membuktikan fakta rompakan itu. Berasaskan fakta, hakim perbicaraan betul dalam menerima laporan sebagai keterangan mengenepikan bantahan bahawa ia suatu dokumen yang dikecualikan. Walaubagaimana pun, setelah menerima dokumen itu, mahkamah harus memutuskan sama ada kandungannya dapat diterima bagi membuktikan fakta rompakan itu. Kemungkiran membantah semasa sesuatu dokumen ditandakan tidak membawa kesan kepada penerimaan kandungannya. Kemungkiran menyoal balas ke atas kebenaran sesuatu kenyataan yang dapat diterima mungkin menjadi suatu pengakuan kebenaran kenyataan itu. Walaubagaimana pun, sesuatu kenyataan tidak dapat diterima semata-mata memandangkan ia adalah benar. Ia harus dapat diterima sebelum kebenarannya dapat dinilai.

[6] Mahkamah Rayuan antara lain memutuskan bahawa P9 dapat diterima memandangkan Jurunilai telah membuat beberapa pengakuan di dalamnya. Walaubagaimana pun, Mahkamah Persekutuan, setelah membaca segala keterangan dalam rekod, tidak menemui sebarang keterangan bahawa perayu telah membuat pengakuan kepada responden bahawa rompakan itu telah berlaku. Tiada juga sebarang keterangan bahawa Jurunilai diberi kuasa oleh perayu supaya membuat pengakuan sebarang fakta kepada responden dan setelah diberi kuasa ini, telah membuat pengakuan itu.

[7] P9 dengan sendirinya tidak membuktikan rompakan itu. Ia tidak mempunyai sebarang nilai bukti. Hakim perbicaraan telah melakukan perkara yang patut dalam menimbangkan segala keterangan atau ketiadaannya dan memutuskan bahawa rompakan itu tidak dibuktikan. P9 tidak mengikat kepada perayu. Berasaskan fakta, tiada sebarang asas bagi Mahkamah Rayuan menterbalikkan keputusan fakta hakim perbicaraan bahawa rompakan tidak dibuktikan.

[8] Responden hanya dapat "garnish" suatu hutang yang perlu dibayar oleh perayu kepada Chan Kim Swee. Chan Kim Swee sekadar telah membuat tuntutan dengan perayu mendakwa berlakunya suatu rompakan sebelum ia telah menghilangkan diri. Hakim perbicaraan tepat mendapati rompakan itu telah disandiwarakan atau tidak dibuktikan. Perayu tidak mengakui liabiliti. Jelasnya tiada sebarang hutang dari perayu kepada Chan Kim Swee yang dapat digarnish.*]*

Case(s) referred to:

Chan Kong Choy v. Inder Singh [1961] MLJ 1 ***(refd)***

Chong Kok Hwa v. Tustio Marine & Fire Insurance Co Ltd [1977] 1 MLJ 244 ***(refd)***

Malaysia National Insurance v. Malaysia Rubber Development Corporation [1986] 2 CLJ 285; [1986] CLJ (Rep) 185 SC ***(refd)***

For the appellant - Tunku Farik Ismail (B Balakumar with him); M/s Azim, Tunku Farik & Wong)

For the respondent - Sulaiman Abdullah (SY Lai, Ng Chek, YW Mak with him); M/s SY Lai & Assoc

Reported by Andrew Christopher Simon

JUDGMENT

Abdul Hamid Mohamad FCJ:

Capital Insurance Berhad, the appellant in this court was the respondent in the Court of Appeal and garnishee in the High Court. Cheong Heng Loong Goldsmiths (KL) Sdn. Berhad, the respondent, was the appellant in the Court of Appeal and also one of the plaintiffs (originally judgment creditor) in the High Court. Chan Kim Swee @ Tung Kim Swi ("the insured") was the judgment debtor and later one of the plaintiffs in the High Court. His position in the Court of Appeal will be stated later. However, he is not one of the Respondents in this court. This appeal is only between Capital Insurance Berhad ("the appellant") and Cheong Heng Loong Goldsmiths (KL) Sdn. Bhd. ("the respondent").

To appreciate the full facts of the case, I shall narrate them in chronological order.

On 16 October 1984, on a consideration of the premium of RM25,802 paid by the insured, the appellant issued a Jeweller's Block Policy No. 000104 JB 84/CKL/JH. Under the terms of the policy, the appellant agreed to insure and indemnify the insured against, *inter alia*, loss arising from any hold-up or robbery of stock and merchandise of the insured's business and bank notes whether the same be the property of the insured or entrusted to him for any purpose whatsoever in the sum of RM600,000. The policy was for a period of one year, ie, from 16 October 1984 to 15 October 1985.

Between 9 November 1984 to 26 November 1984 the respondent sold gold items to the insured totaling RM555,362.97 in value.

On 26 November 1984, about five weeks after the commencement of the policy, and, in fact, on the day the respondent last supplied the goods to the insured, the insured alleged that he was held-up and robbed off goods totaling a sum of RM873,088.66. It was alleged that the robbery happened at 18th milestone, Kuala Lumpur – Seremban road. He was driving his car when a car forced him to stop and he was robbed of his Rolex watch valued at RM1,500, cash of RM18,000 and "barang emas" valued at RM700,000 which apparently he was carrying in his car. No details of the "barang emas" were given in his police report which was only lodged on the following day, more than 24 hours later.

According to Wong Leong Kooi, the Manager of the respondent (SP1), about one week after the alleged robbery, the insured went to see him at his shop. The insured informed him of the alleged robbery, asked for time to pay and promised to pay the respondent RM500,000 after he had obtained the money from the appellant in his insurance claim. The insured would retain RM100,000 for himself.

On 10 December 1984, a claim form was submitted by the insured to the appellant. On the same day, the appellant appointed adjusters to investigate the claim. The adjusters produced a report dated 24 April 1985 (exh. P9).

Again, according to SP1, the last time he met the insured was on 14 August 1985. That was when he (SP1) went to the insured's house "to serve him a copy of a letter dated 14 August 1985" (marked as ID1), a letter of authority by the insured authorising the appellant to pay the insurance money direct to the respondent.

On 20 August 1985, the respondent obtained a judgment in default of appearance against the insured for the sum of RM555,362.97 with interest thereon at the rate of 8% per annum from 13 February 1985 to date of full realisation and costs.

The respondent, as judgment creditor, then took out garnishee proceedings against the appellant and on 21 November 1985 obtained an *ex parte* order from the senior assistant registrar attaching all debts due and accruing from the appellant to the insured. The *ex parte* order also ordered the appellant (as garnishee) to attend before the senior assistant registrar in chambers on 17 January 1986 to show cause why the appellant should not pay the respondent so much of the debt due from the insured to the respondent as might be sufficient to satisfy the judgment together with costs of the garnishee

proceedings. The application to show cause was dismissed by the senior assistant registrar. In other words, no garnishee order was made against the appellant.

Report of a private investigator (Malaysia Broadwide Investigation Agency & Adjusters Sdn. Bhd.) tendered by SP4 and marked as P6 shows that eleven investigations done during the period of 5 April 1986 to 16 April 1986 were unsuccessful to trace the insured.

Coming back to the garnishee proceedings, the respondent appealed to the judge-in-chambers. The insured did not appear before the senior assistant registrar, did not appeal against the order of the senior assistant registrar and did not appear before the learned judge-in-chambers.

On 6 July 1987, the learned judge (Shanker J, as he then was), at the hearing of the appeal from the order of the senior assistant registrar, on his own and without any application being made by the respondent, ordered that:

(a) the garnishee proceedings proceed to trial wherein the respondent shall be the plaintiff and the appellant shall be the defendant;

(b) the question to be tried shall be whether there is any debt due or accruing due and so what amount under the policy from the appellant to the insured at the time the Garnishee Order was served on the appellant.

(c) The insured (judgment debtor) shall be named as a co-plaintiff.

(d) The Public Trustee be appointed to represent the interests of the insured (judgment debtor).

The learned judge also made consequential orders regarding the service of pleadings.

Pursuant to the order of Shanker J dated 6 July 1987, the respondent and the insured (according to the heading in the statement of claim) filed a statement of claim dated 27 July 1987, which must have been filed either on that day itself of thereabout. The suit number is stated as "SUIT No.C 2859 of 1985". This is quite misleading. It makes one think that the statement of claim was filed in 1985, when it was only filed on or about 27 July 1987. The number is the garnishee proceedings number, which was filed in 1985.

The insured was named as the second plaintiff. Both the respondent and the insured prayed for the payment of the insured sum by the appellant.

The statement of claim clearly states that Messrs. S.Y. Lai & Associates who filed the statement of claim was only acting for the respondent. No separate statement of claim was filed by the Public Trustee who had been ordered by Shanker J to represent the interests of the insured. However, learned counsel for the respondent, in answer to our question, said that the Public Trustee "approved" the statement of claim. This was confirmed by the officer representing the Public Trustee who, on our instruction, appeared before us in court.

The suit was heard by Ariffin Jaka J (as he then was). It started on 7 June 1995 and the judgment was given on 23 July 1996. Another private investigation was carried out by IIA Services Sdn. Bhd. while the trial was proceeding. It covered a period from 25 September 1995 to 27 September 1995. The insured could not be traced – see evidence of SP6 and P10.

So, the last time the insured was seen by SP1 was on 14 August 1985, about ten years before the trial began before Ariffin Jaka J. And, the last time the insured did anything to pursue his claim against the appellant was on 10 December 1984 (ie, when he filed his claim form with the appellant) which is about eleven years before the trial began.

Before going any further it is now time to look at the position of the insured in these proceedings. Unfortunately, a copy of the garnishee summons was not included in the Appeal Record for us to know who exactly were the named parties. But, following the usual form used, Form No. 98 of the RHC 1980 (Garnishee Order to Show Cause), the insured would have been named as a judgment debtor. However, he did not appear at the hearing of the garnishee proceedings before the senior assistant registrar, neither was he represented. He did not appeal against the order of the senior assistant registrar. Only the respondent appealed. He did not appear before the judge-in-chambers, nor was he represented. Though not applied for, Shanker J made the order dated 6 July 1987, two of which were that the insured was to be named as a plaintiff and that the Public Trustee be appointed to represent the interest of the insured. Neither the insured nor the Public Trustee filed a separate statement of claim for or on behalf of the insured. Instead Messrs. S.Y. Lai & Associates filed a statement of claim naming both the respondent and the insured as plaintiffs. The statement of claim was "approved" by the Public Trustee. However, the statement of claim clearly states that Messrs. S.Y. Lai & Associates were only acting for the respondent. The insured did not appear at the trial. An officer of the Public Trustee did appear at the trial but she did nothing except to be present. That is to be expected. After all the Public Trustee was forced by the court order to be there to represent the interest of a person who himself was not interested.

Judgment was given by Ariffin Jaka J against the respondent and the insured. The respondent filed his notice of appeal through their solicitors, Messrs. S.Y. Lai & Associates. The Court of Appeal appeal number is W-02-450-1996. The Public Trustee filed a notice of appeal to the Court of Appeal on behalf on the insured. The appeal number is W-02-451-1996.

The respondent made an application to consolidate the two appeals. But on the day the application was fixed for hearing ie, 27 January 2003, the Public Trustee withdrew the insured's appeal and the appeal was dismissed. As a result, no order for consolidation of the two appeals was ever made. But, in its judgment, the Court of Appeal says "There are two consolidated appeals before us". This is clearly wrong.

A number of questions arise out of these facts. In the absence of the insured and without any application by the respondent, should the learned judge (Shanker J) make the order dated 6 July 1987, *inter alia*, converting a garnishee proceeding into a writ action, directing the insured to be named as a plaintiff and directing the Public Trustee, who was also not a party at that stage and was not present in court to represent the interest of the insured?

While the learned judge had the jurisdiction to make such an order, I am of the view that the learned judge should not have done it. The respondent was no more than a judgment creditor. The respondent knew it. That is why the respondent only commenced a garnishee proceeding. The respondent had no locus to make a claim on the policy. Only the insured had. The insured was not interested. He disappeared and did not appear in any of the proceedings. By directing that the statement of claim be filed (in a garnishee proceeding!) and that the insured be named as a co-plaintiff, though not asked for, the learned judge was actually giving the respondent a leg to stand on to make a claim on the policy which they had no right to. By directing that the Public Trustee to represent the interest of the insured, the learned judge was imposing an unnecessary burden on the Public Trustee to represent the interest of a person who was himself not interested to pursue his claim, for reasons best known to him. As a result, the Public Trustee was forced to tag along and that was what happened.

Secondly, does the fact that the Public Trustee "approved" the statement of claim (what else could one expect them to do under the circumstances?) authorized Messrs. S.Y. Lai & Associates, who clearly stated in the statement of claim that they were only acting on behalf of the respondent, to sue on behalf of the insured on the policy? I doubt it very much.

Thirdly, and most important of all, on 27 January 1996 the Public Trustee that filed the notice of appeal to the Court of Appeal on behalf of the insured withdrew the appeal and it was dismissed. With that, the respondent had no more leg to stand on anymore to claim on the policy. How could the respondent pursue the appeal on the claim by the insured on the policy anymore? The respondent was merely a judgment debtor, not the insured.

Yet, in spite of the insured's appeal having been withdrawn and dismissed and in spite of the fact that no order for consolidation was made (it could not be made as the insured's appeal had been withdrawn and dismissed), surprisingly, the Court of Appeal, in its judgment started off in the second paragraph of the judgment with the statement that "There are two consolidated appeals before us", as if to give another leg for the respondent to stand on again. That is clearly wrong.

In my view, the insured's appeal having been withdrawn and dismissed, the respondents appeal (in the Court of Appeal) should have been dismissed. The respondent has no locus to make a claim on the policy, they being only a judgment creditor.

Unfortunately, learned counsel for the appellant did not see this point. In any event I do not think that this court should close its eyes.

Going back to the trial, at the beginning of the trial before Arifin Jaka, J on 7 June 1995, learned counsel for the respondent informed the court that only the following facts were agreed:

> (a) There was a policy whereby the defendant (Appellant – added) in consideration of the premium agreed to insured the 2nd plaintiff (the Respondent – added) against hold up robbery.
>
> (b) A claim was submitted under the policy.
>
> (c) An adjuster, Thomas Howell Kiewit (M) Sdn. Bhd. were appointed on or about April 1985, a firm of loss adjusters duly submitted a report **to the defendant** (Appellant – added) in respect of the alleged robbery (see encl. 55). (emphasis added).

Learned counsel for the respondent further informed the court that the issues to be decided were:

> (a) Was there a robbery for the amount mentioned in the police report.
>
> (b) Even if there was a robbery for such an amount whether the defendant (Appellant – added) is liable in law to pay the said amount to the 2nd plaintiff (Respondent – added) by reasons of the matter pleaded in para 4 – 6 of the defence. This is a point of law. Refer to Bundle of pleading – "A".

So, those were the only facts that were agreed. Whether there was a robbery was an issue to be decided by the court.

The learned trial judge (Ariffin Jaka J) dismissed the claim. This is what the learned judge said:

> As I had stated earlier the 1st plaintiff (Respondent – added) relied on this report (P9-added) to prove robbery. Although the report is admitted it does not follow that its contents are admitted as a matter of course. If they are hearsay they would be excluded being not admissible. The report states:
>
> Following careful enquiries with the insured, his business associates and the police, we formed the opinion that the robbery was carefully planned by the robbers and know when and where to execute the robbery and they had also planned out the escape.

It is clear that the findings that, "there was a robbery that was carefully planned," is based on interviews with the insured, his colleagues who were with the insured at the time of the alleged robbery and discussions with the police and not from his own personal knowledge. None of the persons interviewed were called to give evidence to substantiate that the robbery did take place. For these reasons I rule that the evidence in respect of the robbery in the report is clearly hearsay. In *Malaysia National Insurance Sdn. Bhd. v. Malaysia Rubber Development Corporation* [1986] 2 MLJ 124 Lee Hun Hoe CJ (Borneo) had this to say on evidence derived from interviews at p. 127:

> In our view the material part of the evidence was derived from interviews and not from his own knowledge. The learned Judge was perfectly right to hold such evidence was hearsay.

Besides the evidence that can be gathered in the report, there is no other evidence to prove that there was a robbery. The evidence of SP3, the Area Inspector attached to Semenyih Police Station does not help the 1st plaintiff at all. He carried out investigation from the date of the report to 1987 in connection with the police report (P8) lodged by the insured. He said that no arrest was made and the investigation was handed over to another officer, PPP Kamarudin who was not called to give evidence. The evidence of SP3 did not conclusively say whether there was indeed a robbery. He said there was no result on the investigation.

I must also say that the circumstance surrounding the alleged robbery and the disappearance of the insured is suspicious. It is indeed strange that the insured lodged the report (P8) more than 24 hours after the robbery. If indeed there was a robbery, one would expect the insured to lodge the report immediately.

The insured seems to have disappeared into thin air, nobody, even his wife, does not know his whereabouts. If it is true that he was robbed there was no plausible reason that he should disappear and choose not to proceed with his claim against the defendant under the policy. To me the only reason I can think of why he disappeared is to avoid paying what he owed the 1st plaintiff. He knew that it would be difficult for him to give particulars to his claim especially details of the robbery.

Taking into consideration all these facts and these circumstances I am more inclined to conclude that the robbery was a fake and hold that there was no robbery. As a consequence I find there is no debt due to the 2nd plaintiff from the defendant.

The learned judge then considered the provision of condition 6 of the policy which says:

> The Assured shall in case of loss or damage and as a condition precedent to any right of indemnification in respect thereof give to the company such information and evidence as to the property lost or damaged and the circumstances of the loss or damage as the company may reasonably require and as may be in the Assureds power.

He cited the cases of *London Guarantee Company v. Benjamin Lister Fearley* (Vol. V – the Law Reports, House of Lords 911) and *Chong Kok Hwa v. Tustio Marine & Fire Insurance Co. Ltd.* [1977] 1 MLJ 244 and held:

> In the present case the failure of the insured to cooperate with the insurers and to come forward to give information and evidence as to the property lost or damaged as required by the insurers to my mind is indeed non compliance with the condition precedent.
>
> On the authority of London Guarantee and Chong Kok Hwa I find that the insured did not comply strictly with the condition precedent and hold that the defendant is not liable under the policy.

The learned judge then considered the issue whether there was a debt due or accrued due that could be garnished at the time when the Garnishee Order Nisi was served on the respondent and held:

> Garnishee Order Nisi was served on the insured 2nd plaintiff. It is trite that the liability of the insurers under a policy is not a debt which could be attached. The order for attachment could only be made if the applicant (the plaintiffs in this case) successfully establish that there is in law a debt due from the garnishee to the judgment debtor (see *Israelson v. Dawson (Port of Manchester Insurance*

Company Limited, garnishee [1933] 1 KB 301, *France v. Piddington (Cooperative Insurance Society, Ltd. Garnishees* – Vol. 43 – Lloyd's Law List Reports, 491).

In the instant case in view of my finding that there is no debt due to the insured (2nd plaintiff) from the garnishee (defendant), I find favour for the defendant. I therefore dismissed both the plaintiff' claim with costs and order that the Garnishee Order Nisi be discharged.

The Court of Appeal allowed the appeal. First, the Court of Appeal reversed the finding of the High Court that the contents of P9 was inadmissible on the ground of hearsay. The Court of Appeal disagreed with the finding of the High Court that the robbery was faked and never happened and held that such a finding could not stand in the face of an admission to the contrary by the appellant. It must be noted here that the Court of Appeal was of the view that that the finding of the adjusters in P9 that the robbery did happen was an admission by the appellant, the adjusters being the appellants' agent. The Court of Appeal was of the view as the respondent had adduced the admission in P9, that the respondent had "discharged the tactical burden on it that the robbery was genuine and had indeed happened. The burden then shifted to the (appellant) to prove that the robbery was faked and never happened." The Court of Appeal noted that the appellant did not adduce any evidence to show that the insured had faked the robbery. The appellant therefore had failed to discharge the evidential burden on them. The Court of Appeal therefore held that the respondent had discharged its burden of proof and that on the balance of probabilities established that the robbery was genuine.

On the finding of the High Court that the insured had breached a condition precedent (ie, condition 6 that requires the insured to give such information and evidence as to the property lost or damaged and the circumstances of the loss or damage as the appellant may reasonably require and may be in the insured's power), the Court of Appeal held that it was not open to the appellant to raise that defence as it was not pleaded that the insured had breached condition 6. The Court of Appeal went on to say:

23. Further, we are not entirely sure that it lay in the [Appellant's] mouth to complain about [the insured's] conduct in this matter. The [Appellant] itself owed a duty to act in good faith when dealing with the claim made on it by [the insured] …

24. Here we have a case where the adjusters appointed by the [Appellant] … had investigated the incident and come to the conclusion that the robbery was entirely genuine. They told the [Respondent] that that was indeed the case. So, the [Appellant] knew that it was liable under the policy. Yet the [Appellant] with full knowledge of this fact went forward on a case based on a denial of liability. Now, that smacks of bad faith in relation to its

> handling of the claim made on it by [the insured]. In the light of these facts, it seems quite out of place for the [Appellant] to complain about [the insured's] failure to cooperate. This is merely a case of the kettle calling the pot black.

On the issue whether there was an attachable debt, the Court of Appeal held that there was, because the appellant had promised to pay the insured on the happening of a robbery and the robbery had occurred. The judgment of the Court of Appeal goes on to say:

> The position does not change where the issue arises in garnishee proceedings. This is because a judgment creditor attaching a debt in the hands of the garnishee steps into the shoes of the judgment debtor and cannot therefore take a better right against the garnishee than that held by the judgment debtor.

For that proposition the Court of Appeal quoted a passage from the judgment of Neal J in *Chan Kong Choy v. Inder Singh* [1961] MLJ 1 @ 3 which, inter alia said that "the judgment creditor cannot stand in a better position than the judgment debtor did and can only obtain what the judgment debtor could honestly give him."

The judgment then cited authorities on the meaning of "contingent debt" and accepted the proposition that a contingent debt is no debt until the contingent happens and held that the contingency (ie, robbery) had happened and therefore there was a debt to be attached.

On those grounds the Court of Appeal allowed the appeal and entered judgment (that is the term used) in the respondent's favour in the sum of RM600,000 together with interest at the rate of 8% per annum from 21 November 1985 until realisation.

On 22 July 2004, this court granted leave to the appellant to appeal to this court. Unlike the usual practice of the court, the questions posed were numerous and they are:

> (a) Whether the contents of a Loss Adjusters' report which is derived largely, if not wholly from interviews with people who were never called by the Plaintiffs to give evidence in Court, is hearsay from the outset and can never be admissible (per Lee Hun Hoe CJ in *Malaysia National Insurance Sdn. Bhd. v. Malaysia Rubber Development Corporation* [1986] 2 MLJ 124)?
>
> (b) Whether the Loss Adjusters, when investigating or adjusting a loss are acting as agents of the insurance company or are they independent professional persons so appointed?

(c) Whether the fact of an agency must be fully established by way of pleadings and evidence to show authority on the part of the Loss Adjusters to make the statement or admission as agent, for Sections 18, 20 and 21 of the Evidence Act 1950 to apply?

(d) Whether the contents of a Loss Adjusters' report can constitute an admission of both liability and quantum by the Insurers if the same is adverse to the insurers, for Sections 18, 20 and 21 of the Evidence act 1950 to apply?

(e) Whether the Plaintiffs have to prove that the principal adopted the acts or representations of the agent, before these acts or representations can be binding on the principal under Sections 18, 20 and 21 of the Evidence Act 1950?

(f) Whether the contents of a Loss Adjusters' report is subject to proof of the contents by the person purporting to use them?

(g) Whether the Applicant Insurers can rely on the fact that the insured has disappeared and failed to turn up to substantiate and pursue his claim to state that there is no policy liability at the time of the service of the garnishee order nisi as this constitutes a breach of Condition 6 of the insurance policy?

(h) Whether unless there is a clear admission of policy liability by the insurers, or award or court order as at the date of the service of the Garnishee Order Nisi, there can be no debt capable of being attached?

(i) Whether the debt due, if any, from the Applicant to the Judgment Debtor, arose or crystallised at the happening of the robbery as decided by the Court of Appeal, or only when the Applicant acknowledges that they owed a debt to the Judgment Debtor?

(j) Where at the time and date when the Garnishee Order Nisi was served on the Applicant, and the Applicant had never agreed to pay any sum to the Judgment Debtor under the Policy and the Judgment Debtor does not pursue the same or had disappeared or had abandoned the claim, can it be said that a debt has crystallised and is due and owing from the Applicant to the Judgment Debtor?

(k) Whether, in the event that the Applicant is found liable, interest of 8% per annum runs from:

(1) the date of the garnishee order nisi, i.e. 21.11.1985, as given by the Court of Appeal?; or

(2) the date when the garnishee order nisi was served, i.e. 18.12.1985, as highlighted by the trial judge? Or

(3) the date when judgment was finally entered against the Applicant as the garnishee, and the garnishee order was made absolute by the Court Appeal, i.e. 26.12.2003?

(l) If the Court awards interest pursuant to either scenario (k) (l) or (k)(2) above, would the interest run only for six (6) years from the date on which the interest became due i.e. 21.11.1985 or 28.12.1985, pursuant to Section 6(3) of the Limitation Act 1953?

I shall now consider the issues that have been argued before us. Learned counsel for the appellant in his written submission submitted on three main points:

(a) admissibility of P9;

(b) whether there is a garnishable debt;

(c) error in quantum and the calculation of interest.

However, in my view, the crux of the matter is (b) ie, whether there is a garnishable debt. However, to decide that issue, other sub-issues will have to be considered and decided upon. They are:

(a) Whether there was really a hold-up or robbery, whether P9 is admissible, whether P9 is conclusive proof of robbery, whether P9 amounts to an admission on the part of the appellant to the respondent, whether there was in fact an admission made by the appellant to the respondent, whether the court should consider other evidence and if so, whether on the totality of the evidence it is proved that there was such a robbery.

(b) Whether liability of the appellant has been admitted or proved.

However, the whole case turns of the answer to the question whether there was a hold-up or robbery or not. It must be noted here that it is the respondent that alleges the robbery and the respondent must prove it.

Was There A Hold-up Or Robbery?

The learned trial judge made a finding of fact that he was more inclined to conclude that the robbery was a fake and held that there was no robbery. In coming to the conclusion that he did, the learned trial judge held that the report was hearsay and noted that there was no other evidence to prove it.

The Court of Appeal disagreed that the report was hearsay. It held that there was a robbery based on P9 which was an admission made by the appellant's agent to the respondent.

My first comment is that the finding whether there was a robbery or not is a finding of fact, which, normally, an appellate court should be slow to interfere, unless, of course, there is a misdirection in law or the finding is so perverse and is not supported by evidence.

My second observation is that while the learned trial judge did consider the whole evidence, or the lack of it, the Court of Appeal decided purely on P9. The learned trial judge had narrated the evidence and gave his reasons why he found that there was no robbery. In my view his reasons cannot be faulted. Indeed, besides what have been noted by the learned trial judge about the suspicious circumstances surrounding the alleged robbery, I note that in his police report (lodged more then 24 hours after the alleged robbery) the insured did not mention at all about the presence of his "two business associates" "companions" or "friends" in his car at the time of the alleged robbery. Throughout his report he kept using the word "saya". Anyone reading the report would think that he was driving alone at the time of the alleged robbery.

But, in P9, it is said that the insured was with his "two business associates", "friends" or "companions" at the time of the alleged robbery. Even their names and identity card numbers were given ie, Yeu Piang Ying, NRIC No.4337757 age 31 and Lee Key Yong NRIC No. 8125941, age 31. The report (P9) further said:

> We have, following our interview with the Insured and his companion (sic) at the time of the robbery and the police, confirmed the circumstances of the robbery as follows:

So, they were traced by the investigators, according to them. Why did the insured make no mention of their presence at the time of the alleged robbery in his police report? Why were they not called? There was no evidence of any attempt to trace them but failed. Were they fake witnesses? I am of the view, even if no adverse inference was drawn against the respondent in respect of the insured, the learned trial judge should have drawn an adverse inference against the respondent in respect of the "two business associates', "companions" or "friends".

Is P9 Admissible?

It is to be noted that the learned trial judge, in his judgment clearly said:

> Although the report is admitted it does not follow that the contents are admitted as a matter of course. If they are hearsay they would be excluded being not admissible.

The learned judge relied on *Malaysia National Insurance v. Malaysia Rubber Development Corporation* [1986] 2 CLJ 285; [1986] CLJ (Rep) 185 (SC) and held that the contents were based on interviews on persons none of whom was called to give evidence and was therefore hearsay.

The Court of Appeal disagreed, as I understand it on two grounds. First, because learned counsel for the appellants did not object to the contents of the report as being hearsay immediately upon the document being marked as exhibit. Secondly, because learned counsel for the appellant did not cross-examine SP5 (or PW5) on the contents of the report. On this point this is what the Court of Appeal said:

> No cross examination was directed against the contents of the report. In other words, the contents of the report were simply not challenged at all. For example, it was not put to the witness that he had no personal knowledge of the matters stated in the report. Neither was there a demand by learned counsel for the respondent that the maker of the report be produced.
>
> 8. Now this omission by counsel to challenge PW5's knowledge of the contents of P9 and calling on the appellant to produce the maker of the contents of the document is a matter of considerable importance for the reason that there is a world of difference between inadmissible evidence and mode of proof at a trial.
>
> …
>
> the absence of an objection as to the mode of proving the adjusters' report before it was marked as exhibit P9 precluded the respondent from taking the point at the end of the case. The respondent's act of taking the objection at the end of the whole case had the effect of depriving the appellant from attempting proof by calling the maker of the document. This goes against the most elementary rules of procedural fairness.

The second reason given by the Court of Appeal will be discussed later.

I agree with the learned trial judge that two things must be distinguished. First, whether the document (P9) is admissible in evidence. Secondly, whether the content is admissible to prove the fact that there was a robbery.

Regarding the first, SP5, a Chartered Loss Adjuster of Thomas Howell Group, Malaysia was called to give evidence. He told the court that Thomas Howell received the instruction from the appellant to investigate the alleged robbery. Investigation was carried out. He then produced the report, in court. At that stage, learned counsel for the appellant objected "to the production of this report on the ground that it is for the sole purpose of litigation." Arguments that followed centered of the question whether it was a privileged document. The learned judge ruled:

Mahkamah: Report yang disediakan oleh Thomas Howell bukanlah satu dokumen yang privilege. Oleh yang demikian report ini boleh digunakan.

The report was then formally produced and marked as P9.

In my view, the learned judge was right in admitting the report in evidence against the objection that it was a privileged document. But, that does not mean that everything stated in the report must be accepted by the court. The document having been admitted, the court still has to decide whether the content is admissible to prove the fact of the robbery.

This is when Malaysia *National Insurance Sdn. Bhd. v. Malaysia Rubber Development Corporation (supra)* becomes relevant. That case too is an insurance claim case. In that case, the issue was whether the evidence of DW1 given in court was hearsay. The fact to be proved was whether the goods were in transit. Even though the exact evidence was not reproduced in the judgment, the judgment is quite clear:

> In our view the material part of the evidence of D.W.1 was clearly hearsay evidence. His evidence was derived from interviews and not from personal knowledge. The learned Judge was perfectly right to hold that such evidence was hearsay. Objections should have been taken to the evidence of D.W.1. Hearsay evidence which ought to have been rejected does not become admissible merely because no objection was taken earlier.

The following points must be noted. First, in that case, the evidence of the witness (DW1) was recorded in evidence without any objection. It remained in the records. However, the Supreme Court held that the trial Judge was right in rejecting it on ground of hearsay. Secondly, the evidence was derived from interviews and not from personal knowledge. Thirdly, it concerns a fact (whether the goods were in transit) and not an expert opinion formed after analysing the material (as in the case of the chemist) or after examining the patient (as in the case of the doctor). All these factors are similar to those in the instant appeal.

Failure to object at the time the document was marked does not affect the admissibility of the content. As the Supreme Court has said it in Malaysia National Insurance Sdn. Bhd.(supra), even though objection should have been taken to the evidence of DW1 (in that case), hearsay evidence which ought to have been rejected does not become admissible merely because no objection was taken earlier. Admissibility is a question of law.

A lot is said by the Court of Appeal on the failure to cross examine SP5 on the contents of the report. This failure, according to the Court of Appeal, has deprived the respondent "from attempting proof by calling the maker of the document." Because of that the Court of Appeal held that "the High Court **should have held that the truth of the contents of the adjusters report P9 had been proved.**" (emphasis added).

Let us bear in mind that, we are still dealing with the question of admissibility, not truth, not yet. Does failure to cross examine the content as to its truth, affect the admissibility? Certainly not. It is trite law that failure to cross examine as to the truth of a statement which is admissible may amount to an admission of the truth of the statement. (Even that depends on the totality of the evidence). But, a statement does not become admissible because it is true, even if it is true. It must be admissible first before its truth may be considered. It is like in the case of a confession: it must be voluntarily made first and admissible before its truth can be considered.

The second ground on which the Court of Appeal held that P9 was admissible was because "The adjusters made admissions in the report (P9)." This is what the judgment says:

> 11. There is a second and equally strong reason for holding P9 to be admissible as to the proof of its contents. There is no dispute about the role of the adjusters, Thomas Howell. They were appointed and expressly authorised by the respondent to investigate into Chan's claim. They were there to find out if Chan's claim was genuine or fraudulent and to report their findings to the respondent. That is precisely what they did. They prepared the report P9 in their capacity as the respondent's agent. The law simply regards their report not as their document but as the respondent's own document. The adjusters made admissions in the report (P9). They said that Chan's claim that he had been robbed was genuine and not fraudulent. That is an admission against the respondent's interest.

I have read the whole of the evidence recorded by the learned trial judge. I could not find any evidence, whether by the witnesses for the appellant or the respondent that says that the appellant had made an admission to the respondent that the robbery had happened. Neither did I find any evidence that Thomas Howell was authorised by the appellant to make an admission of that fact to the respondent and having been so authorised, did make the admission. All that SP5 said, in so far as it is material to the present discussion, is that:

> My firm Thomas Howell carried out an investigation in alleged robbery involving one Chan Kai Swi. The instruction to investigate was given by Capital Insurance Berhad, Thomas Howell received the instruction on 26/11/1984. The investigation was carried out and produced a report.
>
> I have a copy of the report. Report produced.

Now, look at the evidence of SD1, the General Manager of the appellant:

> The company appointed Thomas Howell an investigation firm to carry out an investigation into the robbery. The report prepared by the investigation firm is P9. When we received this report we wanted to interview the claimant (insured – added), but up to date the claimant cannot be traced.
>
> …
>
> The defendant (Appellant – added) does not effect payment because after receiving the report the company was suspicious of the insured involvement in the robbery.

So, after receiving P9, the appellant was suspicious and wanted to interview the insured but he could not be traced.

How could there be an admission by the appellant to the respondent? In any event the respondent did not adduce any evidence of such an admission.

There is also absolutely no evidence that Thomas Howell was authorized to make an admission on the appellant's behalf to the respondent. Furthermore, how could there be such an authorization when the Appellant was suspicious of the insured's "involvement in the robbery"? Thomas Howell was only instructed to carry out the investigation by the appellant for the appellant. As regards the purpose of the investigation, the learned trial judge got it right when he said:

> It is obvious to my mind that the investigation was necessary to determine whether there was a robbery to assist the defendant in determining whether they are bound to effect payment of the claim submitted on 10th December 1984 by the 2nd plaintiff. (ie, insured).

How the respondent came to know about the content of P9 is not known. However, it is most suspicious too. Having known the content which was in their favour, the respondent subpoenaed PW5 to produce it. That is what transpired as can be gathered from the notes of evidence.

Under the circumstances, I am of the view that it is erroneous for the Court of Appeal to hold that there was an admission by Thomas Howell to the respondent and that admission binds the appellant and, therefore, P9 is admissible!

Does P9 Prove The Fact Of The Alleged Robbery?

Assuming for one moment that the content of P9 is admissible, does it prove the alleged robbery? The short answer is that, by itself, it does not. It has no evidential value whatsoever. Even the adjusters were very careful in giving their opinion. They said: "Based on our enquiries, we would advice that we

have no evidence whatsoever to consider the loss otherwise than a genuine one." You simply do not prove a fact positively by not having evidence to the contrary. You must have positive evidence to prove that fact.

Is P9 Binding On The Appellant?

P9 is only a report put up by the adjusters at the request of the appellant to assist them to determine whether to admit liability or not. Even the adjusters were very careful in their report when they concluded:

> We now submit the above for your consideration.

It is up to the appellant whether to accept it or not. The appellant may reject it, agree with it or part of it, may require the adjusters to carry out further investigation or may even request another adjuster to investigate. It is like a landowner asking a property valuer to value his land for the purpose of fixing a sale price for the land. Is the landowner bound by the opinion of the valuer? Can a prospective purchaser who somehow comes to know about it say that the landowner is bound to sell the land at a price not more than the value estimated by the valuer? Even common sense would say it should not be so. To hold otherwise would place a party seeking an opinion of a professional at a risk. He will be bound by whatever opinion expressed by the professional as against the whole world. That cannot and should not be the law. Furthermore, it would encourage dishonesty on the part of the professionals. For a "fee", he may become a "talam dua muka" (literal translation: double-faced tray).

In the circumstances, I am of the opinion that the learned trial judge had done the right thing in considering the whole of the evidence or the lack of it in arriving at the finding of fact that the robbery had not been proved. Consider all these facts: the insured, a person with two names and several signatures, took out the policy on 16 October 1984. He started purchasing gold from the respondent from 9 November 1984 to 26 November 1984 ie, about three weeks after taking out the policy over a period of about 17 days. On 26 November 1984, the last day of the purchase, he alleged that there was a robbery. He did not lodge a report until more than 24 hours later. In his report, he made no mention whatsoever that his "two business associates", "friends" or "companions" were with him. From his police report it is clear that he was alone at the time of the robbery. But, in P9, it is stated that the insured were with his "two business associates", "friends" or "companions" at the time of the robbery. Even their names and identity card numbers were recorded. The two were never called to give evidence. No evidence of any attempt to trace them was introduced.

About one week after the alleged robbery, the insured went to see the Respondent's Manager (SP1) to inform him of the alleged robbery and asked for time to pay until he (the insured) had obtained money from his insurance claim and that he would deduct RM100,000 for himself from the insurance money. In other words he wanted to make RM100,000 from the alleged robbery! Two weeks after the alleged robbery, the insured filed his insurance claim with the appellant. He did nothing after that. Instead the respondent, assisted by the order of the learned judge dated 6 July 1987, stepped in, to pursue the insured's claim. The insured authorized the respondent to receive the insurance money direct from the appellant and disappeared until now.

P9 does not prove the fact of the robbery. The content is hearsay, the opinion of the adjusters has no evidential value and does not bind the appellant and the appellant did not admit the fact to respondent. There is no basis for an appellate court to reverse the finding of fact of the learned trial judge that the robbery had not be proved.

Is There A Garnishable Debt?

The respondent can only garnish the debt if there is a debt due from the appellant to the insured. All that the insured had done before disappearing was to file a claim with the appellant alleging that robbery had happened. The learned trial judge having found that the alleged robbery was a fake or had not been proved, with whom I agree and the appellant had not admitted liability, certainly there is no debt due from the appellant to the insured yet that could be garnished.

Conclusion

As on these grounds alone, it is sufficient for this court to dispose of the appeal, I do not think that it is necessary to consider the other questions posed. I would summarize my grounds for allowing the appeal as follows:

First, the appeal by the insured having been withdrawn and dismissed by the Court of Appeal, the respondent, being a mere judgment debtor had no *locus standi* to pursue the appeal which, in effect was to pursue the claim on the policy in place of the insured.

Secondly, on the facts of the case, the learned judge cannot be faulted for his finding of fact that the robbery was fake or had not been proved. The whole circumstances, before and after the alleged robbery, are so suspicious that the finding of fact of the learned trial judge should not be reversed by an appellate court.

Thirdly, even though P9 was rightly admitted, the content is not admissible on the ground of hearsay.

Fourthly, the opinions P9 of the adjusters have no evidential value.

Fifthly, P9 is not binding on the appellant.

Sixthly, no admission was made by the appellant, by themselves or through the adjusters that they admitted that robbery has occurred. Nor had the appellant ever admitted liability to the insured. There is also no evidence that the appellant ever made any admission to the respondent.

Seventhly, there is no debt due from the appellant that the respondent, as a judgment creditor, may garnish.

In the circumstances, I would allow the appeal with costs and order that the deposit be refunded to the appellant.

My learned brother, Steve Shim Lip Kiong CJ (Sabah & Sarawak) and my learned brother PS Gill FCJ who have had sight of this judgment concur that for the reasons given, this appeal ought to be allowed with costs and that the deposit be refunded to the appellant.